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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 368

EARNEST LALLAK,

Petitioner,

vs.

THE FARMERS' MUTUAL INSURANCE COMPANY OF MARYSVILLE, KANSAS, HELEN E. HOBBS AND ETHEL MARIE KLING

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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PETITION FOR A WRIT OF CERTIORARI

To the Honorable Fred Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Earnest Lallak respectfully petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of the State of Kansas to review and reverse the decision and judgment rendered by such court in Earnest Lallak v. The Farmers Mutual Insurance Company, of Marysville, Kansas; Helen E. Hobbs and Ethel Marie Kling, No. 38985, reported in 174 Kan. 720, for the reasons and upon the grounds hereinafter set forth.

Statement of the Matter Involved

An action was brought on July 5, 1952, in the District Court of Washington County, Kansas by Earnest Lallak against the Farmers Mutual Insurance Company of Marysville, Kansas, upon a fire insurance policy issued by such company to the said Lallak, and which insured him against fire in the sum of $5000.00. While the policy was in force the dwelling house was completely destroyed by fire on December 9, 1951. The company refused payment because of other insurance upon the property, for which no written consent was endorsed upon the policy. (All cited pages refer to "Abstract of Appellant", unless otherwise designated. 1 to 8 and 15 to 22).

Certain preliminary matters were required and presented in the Amended Petition, and which was substituted for the Petition. Then a Second Amended Petition was required by the trial court (15).

A little confusion is created by the trial court striking many allegations from the Amended Petition, and at the same time requiring that Petition to be amended by attaching thereto the application submitted to the company, "providing said defendant, within a reasonable time, furnishes to said plaintiff a copy of plaintiff's request if in writing, for insurance" (14). This necessitated the filing of the Second Amended Petition, which is in substance the same as the Amended Petition except as to this written application for insurance, and which the plaintiff says he never signed, or had any information concerning the same until after the loss of the dwelling house. Nevertheless, the copy furnished by the company was attached, and which had been signed by the agent (16, 17, and 21 to 23). This did represent to the company that there was no other insurance upon the property (25).

The facts set forth in the Amended and Second Amended

Petition were admitted by the Motions to Strike and for judgment upon the same. The facts show that this petitioner, a resident of Kansas, orally applied to an agent of the respondent company for fire insurance upon his dwelling house, and furnished such agent with all the facts requested by such agent. No application was signed or authorized by the insured, but the agent supplied the company with a written application, wherein it was stated that there was no other insurance upon the property. The policy was issued in the sum of $5000.00, and while in force the dwelling house completely burned. This petitioner orally told the agent that he had other insurance against fire, in the Hartford Fire Insurance Company in the sum of $2000.00. Later that policy expired and a new one was secured for the same amount in the same company, with full knowledge and consent of the respondent's agent, who secured the policy sued upon (1 to 5 and 15 to 20).

This policy is a standard stock-plan policy, to which there was not attached a copy of the application made by the agent; and there was not attached to the policy any bylaws of the company. The policy issued and sued upon was a standard farm policy used by the insurance companies of Kansas, "whether they be mutual or stock companies" (3 and 18).

The policy insofar as it is material to this case is set out on pages 6 to 7 of record, and was an agreement to pay the loss by fire upon payment of a stipulated premium, which was paid. There was no provision in such policy that it was controlled by the mutual fire insurance laws of the State of Kansas, or that it was controlled by any bylaws of the company, or that the insured was a member of the company. The only fact disclosed to the insured, which indicated that this policy was controlled by the mutual fire insurance laws was the issuance thereof by a mutual fire insur-

ance company. There is nothing in the record to the contrary, and no bylaws are attached thereto and no written application was attached to the policy. The policy did contain a provision that other insurance may be prohibited (6); and upon the farm property form attached, there was the statement among many others, that "other insurance prohibited, unless written consent by the company is endorsed hereon." There was not such written consent endorsed on the policy (7).

The defendant insurance company filed similar Motions to Strike to the Amended Petition and Second Amended Petition, and which sought to remove all allegations pertaining to Mr. Hatter being agent and acting for the insurance company. These were sustained, but while the one was pending as to the Second Amended Petition, the plaintiff received permission to add thereto a request for reformation of the policy and application (26 to 27).

The defendant company then filed a motion for judgment on the pleadings (27), and which was sustained and judgment rendered for the company (27 to 28).

An appeal was taken to the Supreme Court of the State of Kansas, which rendered the decision set out in the record beginning on page 36, and which was rendered on June 6, 1953. Within time as prescribed by the rules of the Supreme Court of Kansas, a Petition for rehearing was filed which begins in the record on page 43, and which was overruled on July 7, 1953. Thus, we have a final decision by the highest court of the State of Kansas, holding that the same fire insurance policy issued by a mutual company is altogether a different contract from the same policy issued by a stock company, and that the policies which are thus issued are governed by entirely different laws.

It has been the long accepted holding of the Supreme Court of Kansas, that information furnished the agent of

most insurance companies is information to the company; and that if the insured told the agent he had other insurance, and thereafter the company did not, within a reasonable time, reject liability under its policy, that such constituted a waiver of the requirement that written consent be endorsed upon the policy. *Swedish American Insurance Company* v. *Knutson*, 67 Kan. 71, 72 Pac. 526; *Lattner* v. *Federal Union Ins. Co.*, 160 Kan. 472, 163 Pac. 2d 389; *Cooley* v. *Ins. Co.*, 172 Kan. 11, 238 Pac. 2d 526; and *Gilbert* v. *Mutual Benefit Assn.*, 172 Kan. 586, 241 Pac. 2d 768, which cite several prior decisions. Such is the general rule in many states, including Kansas. See 29 Am. Jur. 651, and authorities there cited.

In fact, in the decision and judgment complained of in the present matter the court stated: "Plaintiff next contends that Hatter was defendant's agent and that notice to him of other insurance was notice to the defendant. This contention might have some merit if defendant were a commercial insurance company. Plaintiff's contract of insurance was not with a commercial insurance company, but with a mutual company where a different rule is applicable under G. S. 1949, 40-1001 *et seq.*, such as we have in the instant case."

Jurisdictional Statement

It is contended that the Supreme Court has jurisdiction to review the said decision and judgment of the Supreme Court of Kansas because:

(1) Such decision and judgment of the Supreme Court of the State of Kansas denies the said Earnest Lallak, within its jurisdiction, the equal protection of the laws, as guaranteed by the 14th Amendment to the Constitution of the United States.

(2) Such decision and judgment of the Supreme Court of Kansas, in its interpretation and application of certain

laws of the State of Kansas, impaired the obligation of a contract as between the said Ernest Lallak and the said insurance company, as forbidden by Sec. 10 of Art. 1, of the Constitution of the United States.

Since a stock company policy is the contract between the parties, why is not the same policy issued by a mutual company under G. S. 1949, 40-1017, the contract between the parties, in view of the provision in such section that "the policy as thus issued shall be and constitute the entire contract between the company and the insured"? The decision complained of herein holds that other provisions of the law applicable to mutual insurance companies and the bylaws of the companies are a part of the contract. This constitutes an impairment of the contract, since such provisions entirely change the relationship between the parties and their mutual rights and obligations. Also, since it is the established rule in Kansas, as shown by the decisions above cited, that information furnished the agent of stock companies is information to the company, the failure to apply such rule to mutual companies issuing stock-plan policies, not only violates the contractual relationship of the parties, but does not afford equal protection under the laws of the state as guaranteed by the 14th Amendment to the U. S. Constitution.

The policy issued was the entire contract, and there was nothing therein which made the insured a member of the company or bound by its bylaws. Consequently, when the Supreme Court of Kansas said there was one set of laws applicable to the contract if issued by a commercial company, but a different set of laws are applicable to the same contract when issued by a mutual company, such does not afford equal protection of the laws, as guaranteed by the 14th Amendment to the U. S. Constitution, and is an impairment of the contract.

The decision and judgment of the Supreme Court of Kansas in this matter is predicated upon the theory that Earnest Lallak was a member of the company, and was the insurer as well as insured. Under 42-1017, above cited, the respondent could issue a policy which made all the insureds thereunder members of the company; but such provision also authorizes the issuance of the present policy, and by which provision of such law the policy was "the entire contract between the company and the insured." This did not make Lallak a member of the company. See *Louis H. Pink* v. *A. A. A. Highway Express Inc., et al.,* (314 U. S. 201, 86 L. ed. 152, 62 S. Ct. 241) which held:

> "A mere contract is not a share of stock and when made with a corporation or association does not necessarily connote membership in it. A policy of insurance may be a contract whose terms purport to define completely the relationship and obligations of the parties. Here the policy, which was on its face a contract and nothing more, stipulated only for obligations to be performed by the insurer upon payment of the prescribed premium. The policy's stipulations contained no provision making the insured a member of the association or subjecting him to liability for assessment as such. Although the company was denominated "mutual," that term does not necessarily signify that policyholders are members or subject to assessment."

It has been held that a restrictive covenant enforced by a state court was an unconstitutional discrimination against the Negro and Mongolian races, even though they might have agreed to such covenant. See *Shelley* v. *Kraemer* (433 U. S. 1, 92 L. Ed. (Adv. 845), 68 S. Ct. 836, 3 A. L. R. 2d 441). The importance of that decision as applied to the present case is, that the courts may on behalf of the state, enforce the common laws of the state to the prejudice of its citizens, and thus violate the equal protection clause of the

14th Amendment to the U. S. Constitution. It is the contention of this petitioner that such has been done by the decision of the Supreme Court of Kansas in the present case, and thus a federal question is presented to this court.

The following cases have held that a federal question is involved, if the state by statute or judicial decision, or by any other authorized action, fails to give protection of equal laws to persons similarly situated; and particularly the courts cannot discriminate in favor of one class of citizens against another class of citizens, or in respect to one class of property as against a similar class of property. See *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124, 27 A. L. R. 375; *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U. S. 182, 65 S. Ct. 624, 89 L. Ed. 857; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655; *Cumberland Coal Co.* v. *Green County*, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146.

The foregoing cases together with the *Pink* decision, already cited, show that this petitioner was not a member of the respondent company, but had a contract which was impaired by the Supreme Court decision of Kansas, and that he was not afforded equal protection under the laws of the State of Kansas by such decision.

It must be conceded that only the legislature may impair a contract, and thus infringe upon Sec. 10 of Art. I of the U. S. Constitution. However, impairment of the contract by the decision complained of in this petition, does become important as shown by *Tidal Oil Company* v. *Flannigan*, 263 U. S. 444, 44 S. Ct. 197, 68 L. Ed. 382. This case construed an Act of Congress dated February 17, 1922 (42 Statute 366), as permitting the raising of a federal question in the petition for rehearing, when denied by the state court, if the validity of a contract is involved; and "it is claimed that a change in the rule of law by the highest

court of the state, applicable to the contract, is repugnant to the federal constitution, and the decision of that court was against the claim." This case will be later presented under a heading relating to the timely presentation of the federal question to the state court. At this point, the *Tidal* decision is noted for the purpose of showing that, although the Supreme Court of Kansas impaired this petitioner's contract, that such is not a federal question. Yet, under the Tidal case, another federal question may be timely presented by the petition for rehearing to the state court, if it is claimed in the petition for rehearing that the Constitution was violated by a change of the law of Kansas, by a decision of the courts of that state applicable to a contract. Such was the contention in the petition for rehearing. (P. 43 of Record).

That the court changed its rule of law as applied to mutual companies is shown by *Gilbert* v. *Mutual Benefit and Health and Acc. Assn.*, 172 Kan. 586, 241 Pac. 2d 768, which was decided in March, 1952.

This was a suit against a mutual company, and the rule of law of the state as applied to stock companies was applied to mutual companies, wherein the soliciting agent failed to correctly set forth the facts in the application for insurance. It was held that such agent acted for the company and that it was his duty "to prepare accurately and truthfully an application for insurance so as to reflect the true terms thereof for approval or rejection by the insurance company. The agent's failure to do so is in legal effect the fault of his principal." Earlier Kansas decisions are cited in support of this holding, and among these is the *Phoenix Mutual Life Ins. Co.* v. *Central States Fire Ins. Co.*, 137 Kan. 69, 19 Pac. 2d 696. This case is one wherein the applicant for insurance arranged with the agent for other insurance in another company, and it was held this amounted to consent thereto, and a waiver of the require-

ment that written consent be endorsed on the policy. In the present decision, it was held that the soliciting agent acted not for the company but for the applicant for insurance, and when he signed the application, he signed for such applicant; and that the information as to other insurance given to the soliciting agent was not information to the company. (Record 40-41). This decision also held that the rule as applied to commercial companies was entirely different from that as applied to mutual companies. (Record 40). This is a complete change from the holding of the Supreme Court of Kansas in the *Gilbert* case just cited. The result is that the *Tidal* case is exactly in point and since the contract was declared invalid by the Supreme Court of Kansas, this petitioner could properly present an infringement of the 14th Amendment to the Constitution in his petition for rehearing, and thus raise a federal question.

Question Presented

Kansas Mutual Fire Insurance companies, having authority to issue assessment policies to their members, secured an amendment to such statutory authority, by which amendment they were authorized also to issue a level premium policy, without a copy of the application and bylaws of the company being attached thereto; and which amendment provides that "the policy as thus issued shall be and constitute the entire contract between the company and the insured." Kans. G.S. 1949, 40-1017. Such level premium policy was issued to this petitioner, to which was not attached an application or bylaws. (17). This policy was a "standard farm policy used by many insurance companies in the State of Kansas, whether they be mutual or stock companies." (18). This form of policy was approved by the Commission of Insurance of this State, who "treated the defendant company as well as other mutual

and stock companies, who used such form of policy, as being the insurers who have the same rights and obligations as set forth in the policies issued by them; and thus licensed and approved their policies and insurance business." (21) (18).

May a state, by judicial decree, constitutionally enforce certain common laws of the state as against stock insurance companies, and not against mutual insurance companies, to the prejudice of policy holders of the latter companies, where both types of companies are authorized by the state to and do issue the same commercial policies for level premiums? (The common laws of the state thus differently enforced being, that the soliciting agents act for the stock companies, and any information given them by an applicant for insurance is information to such companies; and if such applicant tells the agents of the stock companies he has or will secure other insurance on the property, such is notice of these facts to the stock companies, but not the mutual companies, and that if the stock companies, but not the mutual companies issue the policies or fail to cancel the same within a reasonable time, such is a waiver by the stock companies, but not by the mutual companies, of a provision in the policy requiring written consent for such other insurance to be endorsed on the policy.) Does not such discrimination violate the Fourteenth Amendment to the U. S. Constitution, when the State Supreme Court enforces such laws as to stock fire companies, but refuses to enforce the same laws as against mutual fire companies, even though they issue exactly the same policies, only because such policies were issued by mutual companies.

Reasons Relied On for Allowance of the Writ

1. This court has construed the Fourteenth Amendment to the U. S. Constitution as requiring the protection of

equal laws, and that all persons shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed. See cases already cited. Among these is *Shelley* v. *Kraemer*, which held:

> "It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process."

2. This petitioner was not a member of the respondent company, as held in the *Pink* case, but held a level premium contract to pay him $5000.00, upon destruction of his dwelling by fire, and which contract the statute law of the state said was the entire contract. Kansas G.S. 1949, 40-1017. The property rights under this contract were taken away by the Supreme Court of Kansas refusing to follow its common-law holdings as applied to the same contracts, when issued by stock companies. The Kansas decisions cited above clearly declare the common-law of Kansas that an insured does not forfeit his rights under a policy because of other insurance, when he advises the company's agent of such other insurance. In fact, such holding was made in one mutual insurance case in March, 1952. See *Gilbert* v. *Mutual Benefit Acc. Assn.*, 172 Kan. 586. Nevertheless, Kansas, acting through the Supreme Court of that State, held in the present case that such common-law does not apply to the same policy issued by a mutual fire insurance company, only because it was issued by such mutual company. The same contract must be governed by the same law, without respect to the party thereto, otherwise there is no equal protection under such laws. Instead, there is a discrimination against the stock fire insurance companies in favor of the mutual fire insurance companies in

situations where they issue the same contract. There is also a discrimination against the insureds under such mutual policies, *only* because such were issued by mutual rather than stock companies. This certainly is not treating the stock companies and the insureds with the mutual companies alike, under the same circumstances and conditions, as to privileges conferred and liabilities imposed.

3. The Kansas statute above cited, which authorized the policy sued upon, provided that such was the entire contract between the parties. Yet, the Supreme Court of Kansas held that the application, the bylaws of the company, and certain statutes governing mutual fire insurance companies, in relation to their assessment policies, were a part of the contract. The decision made by the court in the present case, show the unjustified discrimination in favor of mutual fire insurance companies issuing the level premium policies as against the insureds thereunder and as against stock companies issuing the same policies.

4. This is a substantial matter since it concerns many persons and corporations, as all the states have laws authorizing fire insurance policies to be issued by stock companies and mutual companies. Besides, this federal question concerns all types of insurance companies, whether they be fire, life, health, accident, burial or what-not. If the present decision of the State of Kansas stands, it will be looked upon as a precedent, and will be used by the mutual companies in denying liability, because of their agent's transactions. If this decision stands, then the general public has no protection, because there are very few who do appreciate the difference between mutual and stock companies, and consider an insurance policy as a contract in accordance with its terms, without respect to the maker thereof. If the present decision stands, then it will be unsafe for anyone desiring insurance to secure the same through an agent,

because if the agent happens to represent a mutual company he can prepare and sign the application for the person desiring insurance, and then fail to give the company the information supplied him by the applicant for insurance, and the applicant, not the company, is bound by the agent's knowledge and acts.

5. The exact question now before the court appears never to have been presented, although the basic principles involved in this case have been settled by this and many other courts, and which principles have been determined by opinions that do not accord with the decision complained of in this petition. Thus, in the Pink case it was held that holders of policies, such as the one purchased by this petitioner, is not a member of the mutual company issuing the same, and the mere fact it was issued by a mutual company, did not change the contract. There are many federal and state decisions to the same effect. This court has held, as in the *Truax* case, that equal protection means equal protection under equal laws as to all persons in similar situations. The *Shelley* v. *Kraemer* case held that, rulings by the state courts can infringe upon the equal protection clause of the Fourteenth Amendment, by enforcing a common-law rule of the state that does not afford equal protection to all persons in similar situations. That such was done in the present case is clear from the decision quoted, wherein the Kansas court held, that mutual fire insurance companies are to be favored and governed by different laws, even though they issue a level premium policy, issued by stock companies. Also, that the application and bylaws are part of the policy when not attached, notwithstanding 40-1017 says the policy as issued is the entire contract, and even though the insured has never seen the application or bylaws. Also that the agent appointed by the company, as required by Kansas

G.S. 1949, 40-239, 240 and 241, acts for the applicant for the insurance and not for the company.

6. The decision complained of is not in accord with the principles laid down by this court and other courts, including Kansas. See *Gilbert* v. *Mutual Benefit and Health and Acc. Assn.*, 172 Kan. 586, 241 Pac. 2d 768, and the decisions therein cited. That decision followed the previous holding of the Supreme Court of Kansas, that the soliciting agent acted for the company and not for the applicant for insurance, and that "it is the duty of a soliciting agent to accurately and truthfully state the full terms upon which an application is made and to submit it in that form to the principal for his approval or rejection. The failure of a soliciting agent to do so is in legal effect the fault of his principal." True, this involved an accident and health policy issued by a mutual company. But there can be no difference as to the principles involved, whether the same be a life, accident, health, fire or burial policy. It is a contract sold through agents, and the same rules of law should apply to similar situations. Otherwise, great confusion and uncertainty is bound to arise and great injustices be done. There are many decisions of the federal and state courts holding that the contract governs and not the kind of the company issuing the same, and if a mutual company issues a standard policy for a level premium, then the rights and liabilities are the same as those issued by stock companies. The following are a few of these cases:

> *Driscoll v. Washington County Fire Insurance Company,* (C.C.A. 3d), 110 Fed. 2d 485; *American Ins. Union* v. *Lowry* (5 C.C.A.), 62 Fed. 2d 209; *National Union* v. *Marlow,* 74 Fed. 775, 21 C.C.A. 89; *Knott* v. *Insurance Co.,* 161 Mo. Appl. 579, 144 S.W. 178; *Fowler* v. *Missouri Mutual Assn., (Mo.)* 86 S.W. 2d 946.

Was the Federal Question Urged in This Petition Timely Presented to the Supreme Court of Kansas?

This case was presented to the Supreme Court of Kansas upon printed abstracts, which are a part of the record in this case, and also printed briefs were filed. The trial court had rendered judgment upon the pleadings as against this petitioner, after striking many allegations pertaining to the agent. These rulings were complained of in the "Specifications of Error." (37 to 40) Three of these are as follows:

> "The trial court erred in holding that the plaintiff was bound to know of the claimed limitations of authority of said J. W. Hatter, as agent for the defendant insurance company.
>
> The trial court erred in holding that the defendant insurance company was not bound by the information furnished the said Hatter by the plaintiff, when the latter requested the insurance sued upon.
>
> The trial court erred in holding that the defendant insurance company was not bound by the information furnished the said Hatter by the plaintiff, when the latter requested the insurance sued upon.
>
> The trial court erred in holding that the defendant insurance company was not bound by the information furnished the said Hatter shortly before February 12, 1951, as to other insurance and as to the renewal thereof."

This petitioner in his brief before the Supreme Court of Kansas, pointed out the holdings of that court that in insurance cases generally, the insurance agent in making out the application, acts for the company and not for the applicant, "and if the applicant makes truthful answers to the questions propounded the company cannot generally take advantage of false answers entered by the agent contrary to the facts stated by the applicant." *Cooley* v. *National Ins. Co.*, 172 Kan. 10, and *Gilbert* v. *Mutual Benefit Assn.*, 172 Kan.

586, and other cases were cited. It was also pointed out that when information is given to the agent concerning other insurance, that such is information to the company and its failure to cancel the policy is a waiver of the forfeiture provision therein. There was cited in support of this holding these cases: *Swedish American Ins. Co.* v. *Knutson*, 67 Kan. 71, Pac., and *Lattner v. Federal Union Ins. Co.*, 160 Kan. 472, Pac. The abstract and brief pointed out that the policy as issued was a stock-plan or commercial policy, and the mere fact it was issued by a mutual company did not change the nature of the contract; and that this petitioner did not become a member of the company, and was entitled to enforce his contract, *the same as if it had been issued by a stock company.* Many authorities were cited as showing that when such a policy is issued for a flat premium, that there can be no further assessments, nor is there returnable to the insured any portion of his premium, and that he does not share in the profits and losses of the company, as is the rule pertaining to mutual insurance companies as to policies issued on the mutual plan. Among the cases cited were those listed in this petition.

In fact, there are but few authorities, if any, which have held contrary to the foregoing rules. Consequently, it could not have been anticipated that the Supreme Court of Kansas, in this case, would acknowledge such to be the general rules, but that such did not apply only because the policy sued upon was issued by a mutual company. This is particularly so in view of *Gilbert* v. *Mutual Benefit Assn.*, 172 Kan. 586, 241 Pac. 2d 768. It would have been presumptuous to have anticipated the decision in this case, and to have told the Supreme Court of Kansas that if you desire to show favoritism to mutual companies, simply because they are such, even though they are engaging in the commercial insurance business of issuing policies upon the stock plan for a flat

premium, that such will violate the Fourteenth Amendment to the Constitution of the United States. However, when the Supreme Court of Kansas took this position of favoritism notwithstanding the commercial policy issued, all this petitioner could do was to file a petition for rehearing, pointing out that the decision does violate the Fourteenth Amendment to the Constitution of the United States. The rules of the Supreme Court of Kansas provide for such petition for rehearing, and the decision of the Supreme Court of Kansas does not become final until such petition has been acted upon. Such motion was filed within time and therein the constitutional questions urged in this petition was presented and argued, and were supported by many of the authorities pointed out in this petition. (6)

The following decisions of this Court have held that where the decision of the highest court of the state is complained of as violating the constitution, and prior decisions did not foreshadow the same, that the appellant can question the same in his motion for rehearing, and thus timely raise the federal question presented to this honorable court. *Saunders* v. *Shaw,* 244 U. S. 317, 37 Sup. Ct. 638, 61 L. Ed. 1163; *Herndon* v. *Georgia,* 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530, and decisions cited therein.

Still, it might be thought that this petitioner should have anticipated that the opinion of the Supreme Court of Kansas would be in violation of the Constitution of the United States, in not affording holders of stock-plan policies issued by mutual the same protection given holders of the same policies issued by commercial companies. This is because of the prior decisions of the Supreme Court of Kansas. These decisions, and which are cited in the opinion of the Kansas Supreme Court, show that in all of those cases the policy issued was not a commercial but the mutual type of policy with the bylaws attached, and that the holders of

the policies were actually members of the company and bound by such bylaws; and that such bylaws prevented his recovery. There are no prior decisions in Kansas, or by any other jurisdiction, that go so far as to say, merely because a mutual company issues a commercial policy that it is not bound by its contract, and that the law applicable to commercial policies shall not apply to such commercial policy.

In fact the case of *Gilbert* v. *Mutual Benefit Assn., supra,* was a decision of the Supreme Court of Kansas clearly holding in March, 1952, to the contrary.

The case of *Saunders* v. *Shaw* just cited, held:

> "The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance."

In the *Herndon* v. *Georgia* case, it was held that where the Supreme Court of the state invaded the constitutional rights of a citizen of that state, that "a motion for rehearing diligently pressed thereafter would be seasonable notice." Cases are cited and this Court concluded: "It is the doctrine that must prevail if the great securities of the Constitution are not to be lost in a web of procedural entanglements."

We also call attention to the Tidal decision already discussed, and which construed a federal statute as showing that the petition for rehearing filed in this case came within that statute, and timely presented a federal question.

It is necessary that the decision of the Kansas Supreme Court in this case, be reviewed and reversed, in order to protect the many policy holders in the State of Kansas and other states, who have fire insurance policies of standard form and issued for a level premium by mutual companies; and also to require such mutual companies and stock com-

panies, issuing the same standard policies, to be governed by the same common-laws of the state. Besides, if this decision stands, such could very well be followed as a precedent in Kansas and in other states in controlling other types of insurance, and thus much confusion arise and injustice be done.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted to the Supreme Court of the State of Kansas to review and reverse the decision and judgment rendered by such court in the case of *Earnest Lallak v. Farmers Mutual Insurance Company of Marysville, Kansas, Helen E. Hobbs and Ethel Marie Kling*, being No. 38985, in such court; and if need be that such Writ be also directed to the District Court of Washington County, Kansas, wherein said action was originally filed, and judgment rendered, from which an appeal was taken to the Supreme Court of Kansas, and by such court decided in said case No. 38985.

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Supreme Court of the United States

OCTOBER TERM, 1953.

No. 368.

EARNEST LALLAK, PETITIONER,

VS.

THE FARMERS' MUTUAL INSURANCE COMPANY, OF MARYSVILLE, KANSAS, HELEN E. HOBBS AND ETHEL MARIE KLING.

BRIEF OF RESPONDENT, THE FARMERS' MUTUAL INSURANCE COMPANY, OF MARYSVILLE, KANSAS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF MATERIAL FACTS.

At the outset, the respondent Farmers' Mutual Insurance Company, of Marysville, Kansas, calls attention to the fact that the defendants Helen E. Hobbs and Ethel Marie Kling are in nowise parties to the judgment that petitioner Lallak complains of. Their cross-petitions, based upon the standard mortgage clauses in their respec-

tive favors attached to the policy purporting to insure the mortgagor Lallak, have never been tried, but are pending in the trial court. Under the "standard" mortgage clauses any rights they may have obtained are not defeated by the acts of their mortgagor, Lallak, in subsequently taking out other insurance without the consent of the respondent insurer. So such mortgagees have no material interest in certiorari.

It is the position of the respondent company that the petitioner Lallak is not entitled to a writ of certiorari for several reasons, including the following:

1. Petitioner's constitutional objections are rendered immaterial by his position that the written policy is the entire contract.

2. The constitutional questions were not raised in time and were never decided by the Kansas Supreme Court, and petitioner cannot bring himself within any exception that will permit the constitutional questions to be raised for the first time on petition for hearing.

3. The Petitioner's contention is moot, for the reason that he does not have any interest in the policy sued upon, because the defendant mortgagees have prior claims for more than the amount recoverable upon the policy in any event.

4. The situation of the respondent as a Kansas mutual fire insurance company and its relationship to its policyholders are so different from those of the stock companies as to properly place it in a different class, for which the Constitutional provisions do not require the same treatment.

5. Petitioner, by wholly repudiating the written application required by the statute as a condition to a valid policy, has left the policy unauthorized and void.

6. Petitioner, in holding to the position that the written policy is the entire contract, bars himself from any benefits of alleged oral statements to and by the agent, and his admitted violations of the terms of the written contract (the policy) rendered it void.

2. The constitutional objections sought to be raised in the petition for writ of certiorari were never so presented to either the District Court or the Supreme Court of Kansas as to call for any consideration by either of such courts—and the Supreme Court did not consider or decide such matters. No contention whatever based upon any constitutional question was ever raised or called to the attention of the trial court, or called to the attention of the Kansas Supreme Court by assignment of error, brief, or oral argument, or until after final decision by the Kansas Supreme Court. It was only after all these proceedings were complete that the constitutional questions were first disclosed in the petition for a rehearing (R. 43).

That Court, pursuant to its regular practice of considering only those rulings of the trial court which had been assigned as error and urged in brief, did not consider or determine the Constitutional questions so tardily raised. Its ruling on the petition for rehearing was without opinion, simply "Denied" (R. 46). Further, as we shall show later in the argument, the decision of the Kansas Supreme Court sought to be reviewed did not involve any change whatever from its former decisions or rulings. So it cannot be said that the petition for rehearing was petitioner's first opportunity to raise the Constitutional questions. They could, and if possessed of merit should, have been raised in oral argument before the trial court, and assigned as error, and briefed and orally argued when the appeal was regularly presented in Supreme Court.

3. The petitioner does not have any pecuniary interest in the controversy concluded by the State Court

judgment—that is, in the insurance policy or its proceeds. The policy is for $5,000.00 (R. 6). It specifies that the company shall not be liable for a greater proportion of any "loss" than the amount insured shall bear to the whole insurance covering the property, whether collectible or not (R. 6). At the time of the fire the petitioner, in addition to the $5,000.00 policy with the respondent, held a $2,000.00 fire policy with the Hartford Fire Insurance Company (R. 3, 4 and 17), thus making a total insurance of $7,000.00. The respondent's five-sevenths maximum share of the $5,000.00 amount of "loss" (fixed by statutes cited later) is $3,571.43, which is the total amount that could be recovered by all beneficiaries under the policy. It is shown that the two mortgagees named in the mortgage clauses had claims on the proceeds of the policy of $923.70 (R. 19) and $2,900.00 (R. 20) respectively, which are prior to the claim of the petitioner, and amount together to $3,823.70, or $306.27 more than the total amount recoverable on the policy in any event. So on petitioner's own showing there is no surplus available for him, and he has no interest in the action.

4. The difference in the makeup and nature, and in relationship to the policyholders, stockholders, and members of commercial or stock insurance companies, and of the mutual fire insurance companies organized and operating pursuant to Chap. 40, Art. 10, of the Kansas statutes places the holders of their respective policies in situations materially unlike, and justifies different classifications and treatment of the two classes of companies. The holder of a fire insurance policy of a stock company has no right, share, or interest in the company save such creditor's right as the policy may afford him in case of a fire loss. On the other hand, every holder of a policy in one of the Kansas mutual fire insurance companies, such as the re-

spondent, *ipso facto* by operation of the Kansas statutes (R. 13, 40) becomes a member and owner of the company, with the same rights as any other member to vote, control the company, fix its rates, and share in any distribution of its assets, so becoming in effect the insurer as well as the insured.

The differences in the two kinds of companies and their respective policyholders, and in the cost to the policyholders, are fundamental and substantial.

5. Now coming to the facts relative to the petitioner's application for the insurance policy in question: as will be shown later in the argument the Kansas law makes a written application essential to the issuance of a valid policy by a Kansas mutual fire insurance company. The record here shows that the agent to whom the petitioner orally applied for insurance prepared such a written application, and submitted it to the company, and the policy in suit was issued in reliance upon such written application (R. 16, 17). The petitioner at the time he applied for the policy in suit (Policy No. 160478) (R. 6), was the holder of the respondent company's Policy No. 148882 (R. 21), and therefore a member of the company, and was charged with notice of the statutory requirements of a written application. He could have adopted the written application so prepared for him by the agent and obtained its benefits. Instead, he renounced and repudiated the written application (R. 16-17, 29-31). He founded his policy rights solely upon his oral application (R. 29-31).

The policy that the petitioner accepted and retained for some three years clearly provided "other insurance prohibited unless written consent by the company is endorsed hereon" (R. 6, 17). "There was no endorsement of other insurance upon the policy" (R. 7). Yet at the

time the petitioner was making his request for the policy in suit he had $2,000.00 of other insurance on the particular building (R. 3, 17). Later, during the specified term of the policy in suit, and prior to the fire, he procured a $2,000.00 renewal policy of the Hartford on the same dwelling house (R. 4, 17). Thus the petitioner twice violated the material condition against other insurance, and rendered it void.

ARGUMENT.

1. The Constitutional Objections Rendered Immaterial by Petitioner's Position That Written Policy Is the Entire Contract.

In his petition to this Court petitioner states and holds to the position that "The policy issued was the entire contract" (Br. 6, 10, 13). This necessarily means that the terms of the written policy cannot be changed, enlarged or nullified by any oral statements to or by the agent, by oral notice to him, or by any attempted oral waiver or consent by him, and that respondent is not bound by any such matters.

Yet the gist of petitioner's complaint here is that in his case against this respondent mutual fire insurance company he was not permitted to bind the company by the oral matters alleged relative to the agent so as to change or avoid the written policy terms to the extent that he would have been permitted to do if he had held a stock company policy and been suing such company—and that because he was not so permitted by the decision of the state courts he has been denied the equal protection to which the federal constitutional provisions entitle him, and the obligation of his contract has been impaired. In other

words, he complains that he was denied the privilege of materially changing the terms and impairing the obligation of the written policy that he insists is the sole and exclusive contract. Certainly the effect of the state decision was to enforce his policy according to its terms, without impairing it by extraneous matters.

Having deliberately chosen to hold to the position that the policy is "the entire contract" he should not be allowed to capriciously proceed to the contrary. If petitioner's constitutional contentions were sustained he would not be in position to benefit thereby, or use them to destroy the terms of his policy, because he has declared those terms to be binding and exclusive. He has thereby made his constitutional questions of no consequence in this case, and we submit that there is no occasion to pursue the merely academic questions.

2. Constitutional Objections Not Properly or Timely Presented in State Courts.

In our statement we have already pointed out that the constitutional objections set out in the petition for writ of certiorari (or any other constitutional questions) were never raised in the trial court, and were not presented to the Supreme Court of Kansas in the assignments of error, or brief or oral arguments, but were first attempted to be raised on the petition for rehearing. Under these circumstances the Kansas Supreme Court properly declined to consider or decide such belatedly raised contentions. The Kansas rule and practice are positive to the effect on this.

In *Coleman* v. *MacLennan*, 78 Kan. 711, 744, 98 Pac. 281, the Kansas rule was stated:

> "Under the constitution the appellate jurisdiction of this court is limited to the review of errors com-

> mitted by the trial court from which the record comes. It can not consider cases *de novo* and decide them according to its own notions of the law and the evidence. It can not take new evidence or pronounce any judgment except that the trial court did right or wrong in whole or in part."

In *Coryell* v. *Hardy*, 146 Kan. 522, 524, 72 Pac. 2d 457, there was an attempt on appeal to raise the question of taking appellant's property in violation of provisions of the federal constitution. The Supreme Court said (p. 524):

> "The tenth error complained of is that the judgment constituted a taking of his property without due process of law, and in breach of the Fifth and Fourteenth Amendments to the Federal Constitution. No constitutional questions were raised in the court below, and therefore can not be raised now" (Citations).
>
> Similarly—*Bremen State Bank* v. *Loffler*, 121 Kan. 6, 245 Pac. 742.

It naturally follows, of course, that under the Kansas practice contentions raised for the first time upon a petition for rehearing in the Supreme Court are too late, and can not be considered.

In *Blair* v. *McQuary*, 100 Kan. 206, 164 Pac. 262, the court referred to a point first raised upon petition for hearing, and in respect of this contention said:

> "To this there are two answers, either of which is sufficient. * * * The other equally obvious answer to this contention is that it is too late to raise the question for the first time on a petition for a rehearing in the appellate court when it was not disclosed by the arguments nor in the brief when the case was presented, and when the record does not show that it was raised in the justice court or in the district court."

At pages 16-19 of his brief petitioner sets out four specifications of error made in the Supreme Court of Kan-

sas. All are mere general statements that the trial court erred in its holdings, without any indication in what respect the holdings were claimed to be erroneous, and certainly contained no suggestion that any constitutional questions were involved. Such general specifications of error are insufficient and presented nothing for review. In *Lambeth* v. *Bogart*, 155 Kan. 413, 415, 125 Pac. 2d 377, the rule is stated:

> "We have repeatedly ruled that even an assignment of error which merely alleges the trial court erred in rendering the judgment does not present any specific question for review (*Fagerberg* v. *Johnson*, 48 Kan. 434, 29 Pac. 684; *Lumber Co.* v. *Smith*, 84 Kan. 190, 114 Pac. 372; *Heniff* v. *Clausen*, 154 Kan. 716, 121 Pac. 2d 196). Such an assignment when actually made, amounts to nothing more than a statement that the judgment is wrong. It specifies no particular error and presents nothing for review."

Now coming to the question of whether this (United States Supreme) Court should consider the constitutional questions which were not presented in such manner as to be entitled to consideration and decision by the state courts, we will cite only a few of the many decisions.

In *N. Car. Ry. Co.* v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 S. Ct. 305, this Court held that whether the question was properly raised in the state courts was a question of state practice.

In *Louisville, etc., R. Co.* v. *Woodford*, 234 U. S. 46, 58 L. Ed. 1202, 34 S. Ct. 739, the Court said:

> "The decisions of this court have not only repeatedly held that a federal right, in order to be reviewable here, must be set up and denied in the state court, but have often held that such claim of denial is not properly brought to the attention of this court where it ap-

pears that the state court declined to pass upon the question because it was not raised in the trial court, as required by the state practice."

In *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98 (a certiorari case), this Court said:

> "The Surety Co. petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim thus made can not serve as the basis for review by this court."

In coming to petitioner Lallak's suggestion that this Court might pass upon his constitutional questions, despite the rules just illustrated, because he alleges that he could not anticipate that the decision of the Kansas Supreme Court would be adverse, we are aware that this Court has held (*Brinkerhoff-Faris Tr. & Savs. Co.* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451, and *Gr. Nor. Ry. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 74 L. Ed. 360, 53 S. Ct. 145) that the general rule that a constitutional question is raised too late if put forward for the first time upon a petition for rehearing, is subject to an exception where the State Court had unexpectedly construed a statute differently from its former construction. But no such factual situation exists here. The Kansas Supreme Court's decision in the instant case, *Lallak* v. *Farmers' Mutual Ins. Co., etc.*, 174 Kan. 720, ____ Pac. 2d ____, was in clear harmony with its previous decisions from at least 1915 down to date. This is illustrated by the following cases:

Kennedy v. *Mennonite Mutl. F. Ins. Co.*, 96 Kan. 598, 152 Pac. 639.

Akers v. *Farmers Alliance Ins. Co.*, 118 Kan. 241, 234 Pac. 956.

Jackson v. *Republic Mutl. F. Ins. Co.*, 138 Kan. 371, 27 Pac. 2d 296.

Lohr v. *Farmers Alliance Ins. Co.*, 144 Kan. 776, 62 Pac. 2d 837.

Reser v. *Sou. Kan. Mutl. Ins. Co.*, 150 Kan. 58, 91 Pac. 2d 25.

Petitioner cites *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 44 S. Ct. 197, 68 L. Ed. 382, as permitting the raising of the federal question for the first time in the petition for rehearing when, because of a change in rule of law by the highest court of the state the decision can not be anticipated, so that the petition for rehearing is the first opportunity to raise the constitutional points. Let us examine if there is any factual basis for its application here. For nearly forty years, beginning with *Kennedy* v. *Mennonite Mutual Fire Ins. Co. of Kansas*, 96 Kan. 598, 152 Pac. 639, our Court has consistently recognized for the mutual fire insurance companies organized under the Kansas Statute a status different from that occupied by stock or commercial insurance companies. A number of the decisions are cited in the opinion in this case of the Kansas Supreme Court, appearing at pages 36-42 of the record.

Petitioner urges that the rules so established and followed were changed by the Court's decision in *Gilbert* v. *Mutual Benefit Health & Accid. Assn.*, 172 Kan. 586, 241 Pac. 2d 768, decided March 8, 1952. We find no basis for such contention. In that case the Health & Accid. Assn. was organized under entirely different laws of a different state, and was engaged in a substantially different business. There was no similarity of origin, powers, or business to entitle the Health & Accid. Assn. to the rules established for the local mutual fire companies.

That the decision in the Gilbert case had no reference to the rules applicable to the mutual fire companies is

made clear by the fact that only a month after the Gilbert decision, the same court in a case involving a mutual hail insurance company organized under a different article of the same chapter of Kansas Law that permits organization of mutual fire companies, cited with approval the former decisions of the Court giving "an analysis of the fundamental distinctions and the principles underlying the distinctions between commercial insurance companies and mutual insurance companies," and applied such rules to the mutual hail insurance company policy. That case is *Osborn* v. *Wheat Growers Mutual Hail Ins. Co.*, 172 Kan. 706, 708, 242 Pac. 2d 1084. It was decided April 12, 1952, or over six months before the rendition of the District Court judgment complained of. The Osborn decision made it perfectly plain that the Kansas Supreme Court was adhering to its previous position relative to mutual fire insurance companies, exactly as it adhered to that position in its decision on petitioner's appeal.

Also in support of his contention that he could not have anticipated that "the opinion of the Supreme Court of Kansas would be in violation of the federal constitution" petitioner asserts (Br. 18-19) that in all former decisions of that Court upon the policies of the mutual fire insurance companies such as respondent "the policy issued was not a commercial but the mutual type of policy with the bylaws attached, and that the holders of the policies were actually members of the company and bound by such bylaws; and that such bylaws prevented his recovery." In this view petitioner is mistaken. In the case of *Peterson* v. *Farmers' Mutl. Ins. Co.*, (respondent) 155 Kan. 244, 124 Pac. 2d 504, decided in 1942, "The policy, exhibit A, was a standard farm insurance policy such as used by stock fire insurance companies authorized to do business in Kansas" (p. 246). The policy was this respondent's

standard farm policy identical in all material respects, including fixed cash premium, with the policy petitioner sues on. No bylaws were attached to it, though provisions that in earlier years had ordinarily been in the bylaws were, as in the present policy, actually included in the body of the policy. It is true that at one place in the opinion there is a reference to pertinent excerpts from the "bylaws" "in exhibit A" (p. 248). But since exhibit A is already identified in the opinion as the policy, and no bylaws were ever brought into the case, it is clear that such excerpts were from the body of the policy itself. Furthermore in the Peterson case the plaintiff claimed, with the alleged sanction of the State Commissioner of Insurance, that because of the enlarged field opened to mutual companies by the amendment of 1937, and, of course, the use of the same form of policy as used by stock companies, the obligations of mutual companies were "identical to those of stock companies" (249). The court rejected this contention, and held that neither the amendment nor the use of the form of policy used by stock companies, without bylaws, subjected such mutual companies to the rules applicable to stock companies. In the light of the long and uniform series of mutual company decisions, and particularly this Peterson case based on the same kind of policy, and the *Osborn case, supra,* immediately following the Gilbert decision, counsel in the case at bar should readily have anticipated that the Supreme Court of Kansas would render the decision that it did render. It follows that petitioner has not brought himself within the exception permitting initial raising of a question by petition for rehearing, and is not in position to ask review on certiorari.

3. Petitioner's Contentions Are Moot, Because He Has No Interest.

In our statement we have developed the facts disclosed by the record which affirmatively show that the mortgagee defendants Hobbs and Kling have claims, prior to that of the petitioner mortgagor, in amounts in excess of that recoverable under the policy, from which it follows that there are no funds or proceeds of the policy which the petitioner might recover in any event. If it be argued that the building that was burned had a value in excess of the $5,000.00 amount of the policy, that contention is defeated by the Kansas valued policy law (General Statutes, 1949, 40-905), which, so far as pertinent here, is as follows:

> "Whenever any policy of insurance shall be written to insure any improvements upon real property in this state against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, *the amount of insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss* and measure of damages." * * *

So the true amount of loss was the $5,000.00 amount of the policy, and, since there was $2,000.00 other insurance, the total liability, if the policy were valid, could be only five-sevenths of $5,000.00, or less than the amount admitted by petitioner to be due to the two mortgagees, as previously set out in our statement of facts, leaving nothing whatever for the petitioner.

In *Brownlow* v. *Schwartz*, 261 U. S. 216, 67 L. Ed. 620, 43 S. Ct. 263 (1923), the action was to compel the issuance of a building permit. While the proceeding was pending, the petitioner conveyed all her interests in the property

involved to other persons. In its opinion the Court said (p. 217):

> "It thus appears that there is now no actual controversy between the parties * * * no issue on the merits which this Court can properly decide. The case has become moot for two reasons: * * * and (2) because, the first reason aside, petitioner no longer has any interest in the building, and therefore has no basis for maintaining the action. This Court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. * * * To adjudicate a cause which no longer exists is a proceeding which this court has uniformly declined to entertain (Citations)."

In *Amalgamated Assn.* v. *Wisconsin,* (1951) 340 U. S. 416, 95 L. Ed. 389, 71 S. Ct. 373, the action was certiorari to review an award. The controversy was settled pending the proceedings. The Court said (p. 418):

> "We are informed that this award was superseded by agreement, and in any event, the one year period has elapsed. There being no subject matter upon which this Court can operate, the cause is moot."

In *Doremus* v. *Board of Education,* (1952) 342 U. S. 429, 96 L. Ed. 475, 72 S. Ct. 394, the attack was by a parent upon a New Jersey Statute requiring the reading of Bible verses in the public schools. Before hearing in the U. S. Supreme Court the child graduated. The Court said (pp. 432-433):

> "Obviously, no decision we could render now would protect any rights she may once have had, and this court does not sit to decide arguments after events have put them to rest. *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116, 64 L. Ed. 808, 810, 40 S. Ct. 448."

And we deem this latter decision to be a sufficient answer to the petitioner's contention that there are numerous other persons who are holders of insurance policies with mutual companies and with stock companies, who are interested in the questions involved. Doubtless in this Doremus case there were other parents whose children attend the public schools of New Jersey, and who had an interest. But this did not require the Court to proceed when the ligitant possessed no interest.

And if it be asserted that petitioner has an interest in recovery by the mortgagee defendants, so that the liens on his land might be satisfied or reduced, then two sufficient answers are, that the mortgagees are prosecuting their own law suits, which are still pending in the trial court, and that if the mortgagees do recover, then this respondent is subrogated to their mortgage securities, and will subject petitioner's land to their satisfaction (R. 7).

4. Constitutional Objections Inapplicable Because Stock and Mutual Companies Are Properly Separately Classified.

Petitioner contends that because the Kansas rule does not bind the mutual fire insurance companies by alleged statements made to or by their soliciting agents, or by waivers or agreements alleged to have been made by their agents, while applying a different rule in case of stock insurance companies, he is denied the equal protection of the laws, deprived of his property without due process of law, and the obligation of his contract is impaired, in violation of constitutional provisions. Without discussing the particular terms of the constitutional guarantees we proceed to the proposition that they apply only to persons in substantially similar situations, and are inapplicable where there is a reasonable basis in the facts for distinction. We

feel that the application of this principle of classification disposes of petitioner's complaints.

This Court has many times recognized the right of state legislatures to make one set of provisions for one class of persons, while at the same time enforcing different provisions as to those coming in a different class. And likewise has held that legislatures have broad discretion in classifying, their power being subject only to the limits that the classification must not be arbitrary (*Farmers & Merchants Ins. Co.* v. *Dabney*, 62 Neb. 213, 86 N. W. 1070, affirmed 189 U. S. 301, 47 L. Ed. 821, 23 S. Ct. 565).

Very much in point on the particular insurance classification concerned here is the case of *German Alliance Ins. Co.* v. *Lewis*, (1914) 233 U. S. 389, 58 L. Ed. 1011, 34 S. Ct. 612. This case involved an attack by the stock insurance company upon a 1909 Act of the Kansas Legislature regulating the premium rates permitted to be charged, but specifically exempting the local mutual fire insurance companies. The third headnote is as follows:

> "Exempting farmers' mutual insurance companies organized and doing business under the laws of the state, and insuring only farm property, from the legislative scheme for regulation of fire insurance rates, as is done by Kan. Laws, 1909, Chap. 152, does not render such legislation invalid as to other insurance companies, as denying equal protection of the laws."

The statement by Mr. Justice McKenna (393) includes the facts that the regulatory act complained of provided for fixing of premium rates for commercial insurance companies, but specifically stated that nothing in the act should affect farmers' mutual insurance companies organized under Kansas laws, also that at that time the Kansas law permitted those of such mutual companies as had a guaranteed fund of $25,000 to accept premiums in

cash "and that such premium measures the total liability of the insured under the policy, either to the company or to its creditors," and that the complainant and other stock insurance companies were in direct competition with the exempted mutual companies, and contended that the action of the legislature in exempting the mutual companies deprived complainant of the equal protection of the laws, and the act was therefore repugnant to the Fourteenth Amendment, and unconstitutional and void.

Upon the German Alliance's contention that the exemption from the statutory regulations of the Kansas mutual companies deprived it of the equal protection of the laws, and rendered the act void, the Court said (p. 418):

> "The distinction is therefore made between cooperative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the Statutes of Kansas for the organization of cooperative companies, and if the statute under review discriminates between them, the German Alliance cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. Legislative classification may rest on narrow distinctions. * * * There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 43 L. Ed. 552, 19 S. Ct. 281, Decree affirmed."

In *Hooperton Canning Co.* v. *Cullen*, 318 U. S. 313, 87 L. Ed. 777, 63 S. Ct. 602, the plaintiff contended that a New York statute regulating insurance companies denied

it equal protection of the laws in that different requirements were put upon reciprocal insurance companies than on mutual companies; and in overruling this contention this Court said (p. 321):

> "It is also complained that different requirements have been put upon reciprocals than mutual companies; but we have previously held that a cooperative insurance company may be subject to separate classification for the purpose of determining how it shall be regulated. *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 418, 58 L. Ed. 1011, 1024, 34 S. Ct. 612, L. R. A. 1915C, 1189; Cf. *Tigner* v. *Texas*, 310 U. S. 141, 84 L. Ed. 1124, 60 S. Ct. 879, 130 A. L. R. 1321."

In *N. Y. Rapid Transit Corp.* v. *New York*, 303 U. S. 573, 578, 82 L. Ed. 1024, 58 S. Ct. 721 (1938), where the attack was upon a statute regulating utilities, the Court said (p. 578):

> "I. Classification. No question is or could be raised by the Corporation as to the right of the State, or a municipality with properly delegated powers, to enact laws or ordinances, based on reasonable classification of the objects of the legislation or of the persons whom it affects. 'Equal protection' does not forbid this. Although the wide discretion as to classification retained by a legislature, often results in narrow distinctions, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 418, 58 L. Ed. 1011, 1024, 34 S. Ct. 612, L. R. A. 1915C, 1189 (and others). Indeed, it has long been held the law under the 14th Amendment that 'a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it.' "

Another cogent reason for the distinction in class between the stock and the mutual fire insurance companies

is that with the latter the members, on the whole, obtain their insurance at cost, while with the stock companies earnings and dividends for stockholders are called for. This feature of lower cost has been recognized by the Kansas Court in *Reser* v. *Southern Kansas Mutual Ins. Co.*, 150 Kan. 58, 91 Pac. 2d 25, where it is said (p. 63):

> "On the other hand, mutual fire insurance companies which were originally founded as a matter of legislative policy to enable farmers to obtain insurance at low cost have always been regarded as favorites in Kansas law. * * * Their favored status has been written too deeply and too frequently to change that policy by judicial decree (*Lohr* v. *Farmers Alliance Ins. Co.*, 144 Kan. 776, 778, 62 Pac. 2d 837)."

5. Policy Unauthorized and Void for Want of the Requisite Written Application.

The Kansas Statutes authorizing and governing the organization and business of the mutual fire insurance companies, of which respondent is one, require the applicant to submit a written application for the insurance desired. In *Smith* v. *Miami Farmers Mutual Ins. Co.*, 125 Kan. 102, 262 Pac. 552, a 1928 case involving one of the same class of mutual fire companies, the Court said (p. 13):

> "When Smith requested his policy be renewed he was a member of the company, and was charged with knowledge of the by-laws. When his policy expired his membership in the company expired. He could not again be insured unless he signed an application and incurred the obligations of a member to pay assessments and abide by the by-laws. Renewal policies issued by the secretary and assistant secretary on oral request were issued contrary to the by-laws, *contrary to the statute and were nugatory* until completed as the by-laws *and the statute required*. If the secretary had performed his oral promise to Smith to issue a

renewal policy according to the custom, *the performance would have created no liability* on the part of the company for the loss which occurred," * * *.

In 1929 the Kansas Supreme Court in *Kennedy* v. *Farmers Alliance Ins. Co.*, 127 Kan. 768, 275 Pac. 214, said in respect of another mutual fire insurance company, as follows (770):

> "Policies of insurance can be issued only on written application, which even the secretary of the company would have no authority to waive."

This rule is followed in the decision complained of, where the court said (174 Kan. 720, 723): "40-1003 provides no policy shall be issued except on written application."

The same law, requiring a written application, was in effect at the time plaintiff applied for the renewal policy involved in this suit. As earlier pointed out in our statement of facts, the agent did prepare and submit to the company a written application, upon the strength of which the policy was issued. But instead of accepting the benefit of such application, the petitioner chose to repudiate this application and to stand only on his alleged oral application (R. 18-19, 29-31). This was his own voluntary choice, and of necessity deprives him of a thing which under the statute and foregoing decisions is indispensable to a valid policy. Nothing has occurred to breathe life into the void policy, and the absence of the written application is in itself full justification for the judgment that petitioner complains of.

6. Recovery by the Petitioner Barred Because the Written Policy Is "the Entire Contract."

The petitioner adopts and holds to the position that the policy is the entire contract between the company

and himself (Br. 6, 10, 13). If we add to this, the governing law, which must be a part of every agreement, this position is correct. And where does it leave the petitioner? It clearly deprives him of any benefit of oral statements to or by the agent, and any oral agreements or attempted waivers by the agent, these not having been reduced to writing and embodied in or endorsed on the policy. The policy itself stipulates:

> "No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein, or expressed in writing added hereto" (R. 34).

It further provides "Other insurance prohibited unless written consent by the company is endorsed hereon." (There is no endorsement of other insurance upon this policy.) (R. 6-7.) And the amended petitions admit the breach of this condition against other insurance, both at the time the policy was issued, and again during the term by renewal of such other insurance with the Hartford Ins. Co. (R. 3, 17). We see no escape from the conclusion that the policy was void at all times. As said in *Kennedy* v. *Mennonite Mutual Fire Ins. Co.*, 96 Kan. 598, 599, 152 Pac. 639, where another holder of a mutual fire insurance company's policy was trying to escape the result of having other insurance in violation of the terms of the written contract by repudiating the written application and pleading ignorance of the provision forbidding other insurance:

> "There was obviously no actual contract between the parties unless it resulted from the plaintiff electing to ratify what had been done in his behalf, and to treat the policy as though it had been properly issued upon his request. But he was required to adopt the transaction as a whole or not at all. He could not accept its benefits and repudiate its burdens. * * * The provision concerning concurrent insurance was fair and usual, and was substantially a part of the policy.

> It would be inequitable to allow the plaintiff to enforce the contract with that important feature eliminated."

And in *Akers* v. *Farmers Alliance Ins. Co.*, 118 Kan. 241, 234 Pac. 956, the controversy was because of violation of a provision prohibiting mortgaging of the insured personal property. The insured claimed not to be bound by the prohibition, but the Court said (p. 245):

> "The applicant cannot, however, accept and enforce the policy free from the laws governing its issuance, or 'keep the policy and avoid the by-laws.' *Smith* v. *Insurance Co.*, 82 Kan. 697, 703, 109 Pac. 390."

Likewise, the party cannot keep the policy and avoid the provisions written into the policy itself, as Lallak is seeking to do.

7. Discussion of Petitioner's Citations.

When we give proper weight and consideration to the fundamental distinctions, and the principles underlying them, between stock or commercial insurance companies and the mutual insurance companies such as this respondent, and the fact that the decision of the Kansas Supreme Court in the present case did not involve any change in rules of law applicable, but rather, fully recognized and gave effect to previously established rules, we find nothing in the authorities cited by the petitioner in conflict with the authorities we have just cited in this brief.

None of the cases cited by petitioner on the proposition of waiver, or binding the company by knowledge or acts of the agent, involve the mutual fire insurance companies that we are now concerned with. We have already pointed out that *Gilbert* v. *Mutual Benefit Health & Accid. Assn.*, 172 Kan. 586, 241 Pac. 2d 768, involved a company having a mutual name but not otherwise like our mutual fire insurance companies, and clearly not in the same clas-

sification from the standpoint of the constitutional provisions.

Now coming to the decisions of this Court requiring equal protection of the law to all persons similarly situated, the rule of equal protection is, of course, subject to the equally well established rule that equality is not required between persons or corporations not similarly situated, where there is a substantial basis for distinction. And we regard it as definitely settled by the decision in *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 58 L. Ed. 1011, 34 S. Ct. 612, *supra,* that the distinctions between stock insurance companies and the mutual fire insurance companies of the class represented by respondent and operating on the fixed cash premium basis are sufficient to justify the distinct and separate classification, within the purview of the constitutional provisions.

The *Saunders* v. *Shaw* and *Herndon* v. *Georgia* cases cited on page 18 of petitioner's brief are urged in connection with petitioner's contention that he made timely presentation of his constitutional objections by his petition for hearing, but we have already shown that the Kansas Supreme Court properly under its practice refrained from passing upon such questions, and that its decision did not change any rule, and was in full harmony with all prior decisions of the Court, and should have been anticipated. So there is no basis for application of the rule of the Tidal, Saunders, and Herndon cases.

For the reasons above discussed the petition for the writ of certiorari should be denied.

Respectfully submitted,

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